

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of)
)
 Implementation of the Pay Telephone)
 Reclassification and Compensation Provisions)
 Of the Telecommunications Act of 1996)
)
 The Michigan Pay Telephone Association's)
 Petition for Declaratory Ruling Regarding)
 The Prices Charged by Ameritech Michigan)
 And GTE North, Inc. for Network Access Services)
 Made Available to Payphone Providers in)
 Michigan.)

CC Docket No. 96-128

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

**MICHIGAN PAY TELEPHONE ASSOCIATION'S
 PETITION FOR DECLARATORY RULING**

The Michigan Pay Telephone Association, by its attorneys Clark Hill, PLC and O'Keefe, Ashenden, Lyons and Ward, hereby petition the Federal Communications Commission pursuant to Sections 1.1 and 1.2 of the Commission's Rules, 47 C.F.R. §§ 1.1, 1.2, and 47 U.S.C. § 276, for the Commission to resolve an outstanding legal controversy with respect to the Commission's directives regarding the pricing of intrastate payphone access services. Specifically, the Michigan Pay Telephone Association requests that the Commission issue a declaratory ruling finding that the Michigan Public Service Commission ("MPSC") erred in applying the new services test pricing standard to the rates for network services made available to pay telephone services by Ameritech Michigan and GTE North, Inc.

On March 8, 1999 the MPSC entered its order denying in part the complaint filed by the MPTA and its members that challenged the rates charged by Ameritech and GTE

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filed in May 1997 pursuant to the FCC's orders in this proceeding. The complaint alleged that Ameritech and GTE's rates for network services made available to payphone providers were not cost-based and did not comply with the new services test pricing standard. In denying the complaint, the MPSC found that the "FCC has not specified any particular methodology for determining costs or reasonable overheads for purposes of compliance with the [new services] test." *In the matter of the Michigan Pay Telephone Association, et al. v. Michigan Bell Telephone Company, et al.*, MPSC Case No. U-11756, Order, p. 8, Rel. March 8, 1999. (A copy of the March 8, 1999 Order is attached hereto as Exhibit A.)

The Petitioner requests that the Commission review the March 8, 1999 Order of the MPSC and declare that the MPSC erred in the following respects when applying the new services test to the network services made available by Ameritech and GTE:

- a. declare that the appropriate cost standard to be used in calculating the direct cost of the services in question is a forward looking economic cost methodology that is consistent with state law;
- b. declare that the appropriate cost standard to be applied in calculating a "reasonable amount" for overhead is a forward looking economic cost methodology that is consistent with state law;
- c. declare that the prices for network services made available to payphone providers be set to not produce revenue that subsidizes either the direct costs or the overhead costs associated with other non-payphone services;
- d. declare that the EUCL revenue and other rate elements paid by the payphone providers for non-traffic sensitive costs be attributed to offset the costs associated with the access lines, such that the rate, plus the EUCL would recover the economic cost of the non-traffic sensitive costs of the service; and,
- e. declare that the MPSC not rely upon non-cost-based business service rates when setting the rates for payphone services under the new services test.

The Petitioner requests that the Commission direct Ameritech and GTE to file tariffs for network services made available to payphone providers with the MPSC that comply with the new services test. To the extent the Commission deems it appropriate, the Michigan Pay Telephone Association further requests that the Commission seek comments and issue guidelines and standards by which the Michigan Public Service Commission will determine whether the rates for services are cost-based and comply with the new services test.

PROCEDURAL HISTORY

1. The Michigan Pay Telephone Association (hereinafter "MPTA") is a Michigan nonprofit corporation with its principal place of business at 109 West Michigan Avenue, Suite 1010, Lansing, Michigan. The MPTA is organized for the purpose of promoting and advancing the interests of payphone service providers operating in the state of Michigan.

2. Section 276 of the Federal Communications Act states in relevant part:

(a) NONDISCRIMINATION SAFEGUARDS.--After the effective date of the rules prescribed pursuant to subsection (b), any Bell operating company that provides payphone service--

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) REGULATIONS.--

(1) CONTENTS OF REGULATIONS.--In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after the date of enactment of the

Telecommunications Act of 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

* * *

- (B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues;
- (C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding;

47 U.S.C. §276.

3. Section 276 of the Act establishes requirements designed to promote competition among payphone service providers and promote the widespread deployment of payphone services for the benefit of the general public. Pursuant to Section 276(b) of the FCA, the Commission initiated this proceeding to determine what regulations it would develop to implement Section 276.¹ Beginning with its Payphone Order, the FCC issued several orders adopting regulations and procedures implementing Section 276 of the FCA.

4. To guard against discrimination by incumbent local exchange carriers in the provision of network services made available to payphone providers, the Commission exercised its jurisdiction over the intrastate tariffs for these network services. The

¹*In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) (*Payphone Order*); Order on Reconsideration, 11 FCC 21233 (1996) (*Payphone Reconsideration Order*), *aff'd in part and remanded in part, sub nom. Illinois Pubic Telecommunications Assn. v. FCC and United States*, Case No. 96-134 (D.C. Cir. July 1, 1997). Order, FCC 97-678 (Com. Car. Bur. released April 4, 1997) (*"Bureau Waiver Order"*); Order, FCC 97-805 (released April 15, 1997) (*"Clarification Order"*).

Commission required, *inter alia*, that incumbent LECs file tariffs for basic payphone lines with state public service commissions, and that unbundled features and functions provided by LECs to their own payphone operations or to others be tariffed at both the state and federal levels.²

5. The Commission required that incumbent LEC payphone tariffs filed at the state level be cost-based, nondiscriminatory, and consistent with both Section 276 and the Commission's *Computer III* tariffing guidelines:

We require LECs to file tariffs for the basic payphone services and unbundled functionalities in the intrastate and interstate jurisdictions as discussed below. LECs must file intrastate tariffs for these payphone services and any unbundled features they provide to their own payphone services. **The tariffs for these LEC payphone services must be: (1) cost based; (2) consistent with the requirements of Section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory. States must apply these requirements and the Computer III guidelines for tariffing such intrastate services. [fn.] We will rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276. . . .** Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the *Report and Order*, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the *Report and Order* as revised herein; and 2) that in such case no further filings are required.

Order on Reconsideration, ¶163 [emphasis added]; *See also Clarification Order* at ¶11.

6. The Commission determined that the rates assessed by LECs for payphone services tariffed at the state level must satisfy the requirements that the Commission applies to new interstate access services proposed by incumbent LECs subject to price cap regulation (the "new services test").³

² *Payphone Reconsideration Order*, 11 FCC Rcd at 21307-09.

³ *Implementation of the Payphone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, Order, 12 FCC Rcd 21370 (1997) (*Payphone Limited*

7. The new services test requires that the rates for network services made available to payphone providers be set at the LEC's cost to provide the service. The test is a cost-based pricing standard that establishes the direct cost of providing the new service as a price floor. A reasonable amount of cost to recover a portion of the LECs' overhead costs is then allocated to the service to derive the overall price of the service.⁴

8. The Commission held in this proceeding that it would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of Section 276.⁵

9. In May 1997, Michigan Bell Telephone Company d/b/a Ameritech Michigan ("Ameritech") and GTE North, Inc. ("GTE") filed tariffs with the Michigan Public Service Commission setting forth a description of the services and rates to be charged to payphone providers. The tariffs filed by Ameritech were accompanied by purported cost studies supporting the tariffed rates.

10. When the FCC's orders mandating the New Services Test were issued, the existing rates for GTE and Ameritech's network services provided to payphone providers had been set by Ameritech and GTE in rate-making proceedings under the Michigan rate of return regulations. The tariffed rates filed by Ameritech and GTE under the New Services Test were identical to the rates in existence prior to the FCC-ordered New Services Test pricing standard, and the May 1997 rate filings made no changes to the existing rate-of-return prices.

Waiver Order).

4 See Section 61.49 of the Commission's Rules, 47 C.F.R. § 61.49.

5 *Payphone Reconsideration Order*, 11 FCC Rcd at 21307-09.

11. The tariffs filed by Ameritech in May 1997 set the following prices for services under the New Services Test:

Monthly Recurring Charges:

COCOT	Band A	\$12.72
	Band B	\$12.98
	Band C	\$13.73
Coin Line	Band A	\$19.71
	Band B	\$19.96
	Band C	\$20.70
ProfitMaster	Band A	\$30.22
	Band B	\$30.48
	Band C	\$31.23
Local Usage	\$0.0842 per call	
Toll Usage	Varies depending upon time/day	
Interzone Messages	\$0.1343 for the 1 st minute	
	\$0.0855 for ea. additional message	
Toll surcharge	\$0.12	
Call Screening	\$1.31	
Answer Supervision	\$1.60	
Restricted Coin Access	\$10.75	
End User Common Line	\$5.40	
Interstate No-PICC Charge	\$2.75	
Intrastate PICC	\$2.40	
Non-Recurring Charges		
Line Connection	\$42.00	

12. The tariffs filed by GTE in May, 1997 set the following prices for services under the New Services Test:

COCOT Service

Rate Group	Type I Exchanges	Type II Exchange
1	\$22.26	\$15.80
2	\$22.26	\$15.80
3	\$22.73	\$15.80
4	\$24.36	\$15.80
5	\$25.18	\$15.80

COPT Coin Line \$31.00

Usage (Type II Exchange)	\$0.08 per call
No-PIC	\$5.50
Call Screening	\$1.31
Answer Supervision	\$8.10
EUCL	\$9.60

13. On May 20, 1997, the Michigan Pay Telephone Association filed a petition with the MPSC requesting that that commission investigate on its own motion the tariffed rates filed by Ameritech and GTE to determine whether the rates complied with the New Services Test pricing standard.

14. The MPSC denied the MPTA's petition and held that the Commission was not compelled to initiate a case on its own motion, and that if the Michigan Pay Telephone Association or any other entity believed the tariffed rates were inconsistent with the requirements of the law it should file a complaint and bear the burden of proof on that complaint. (*In the matter of the Petition of the Michigan Pay Telephone Association to initiate an investigation to determine whether Michigan Bell Telephone Company d/b/a Ameritech Michigan, and GTE North Incorporated are in compliance with the Michigan Telecommunications Act and Section 276 of the Communications Act of 1934*, November 7, 1997 Order.)

15. The MPSC did, however, order Ameritech and GTE to release to the MPTA cost studies filed by Ameritech and GTE in two cost study dockets pending at the time before the MPSC. In MPSC Case No. U-11280, the MPSC was investigating the total service long run incremental cost ("TSLRIC") associated with Ameritech's costs for services in Michigan. *In re Michigan Bell Telephone Company*, 1998 WL 404895 (Mich. P.S.C., January 28, 1998, Case No. U-11280 "Ameritech TSLRIC Order".) In MPSC

Case No. U-11281, the MPSC was also investigating the TSLRIC's associated with GTE's costs for services in Michigan. *In re GTE North Incorporated*, 184 P.U.R.4th 387 (Mich. P.S.C Order, Case No. U-11281 (1998) ("GTE TSLRIC Order.")). The MPSC ordered Ameritech and GTE to provide access to these cost studies in order to evaluate whether there was a *prima facie* case for a complaint against Ameritech or GTE.

16. After having been given access to the cost studies filed with the Commission in MPSC Case Nos. U-11280 and U-11281, and comparing those studies against the cost studies relied upon by Ameritech and GTE for their new services test compliance filing, the Michigan Pay Telephone Association identified that neither Ameritech nor GTE relied upon consistent cost studies, assumptions or methodologies between the TSLRIC filed with the MPSC for the new services test compliance filing and the cost studies submitted for approval in Case Nos. U-11280 (Ameritech's TSLRIC docket) and U-11281 (GTE's TSLRIC docket.) The cost studies further showed that the LEC used no methodology to determine what an appropriate overhead allocation would be for the services. Most significantly, the studies provided by Ameritech and GTE further showed that Ameritech and GTE's prices for network services made available to payphone providers grossly exceeded costs.

17. In August 1998, the Michigan Pay Telephone Association and its members filed a complaint against Michigan Bell Telephone Company d/b/a Ameritech Michigan and GTE North, Inc. alleging, *inter alia*, that the rates charged by Ameritech and GTE for network services made available to payphone providers did not comply with the New Services Test pricing standard adopted by the FCC. *Michigan Pay Telephone*

Association, et al. v. Michigan Bell Telephone Company, et al., MPSC Case No. U-11756.

18. The Complaint against Ameritech and GTE proceeded to hearing at which evidence was produced to show that 1) Ameritech and GTE submitted to the MPSC cost studies that were inconsistent with cost studies relied upon by Ameritech and GTE in other MPSC proceedings (MPSC Case Nos. U-11280 and U-11281) (11 Tr. 16 (Confidential); 12 Tr. 1419); 2) both GTE and Ameritech attached cost studies to their May 1997 compliance filing that had been rejected by the MPSC as overstating costs (*Id.*); 3) neither Ameritech nor GTE made any attempt to comply with the new services test pricing formula for their service to payphone providers when they filed their May 1997 "compliance" tariffs with the Michigan Public Service Commission; 4) both GTE and Ameritech used no methodology to identify or calculate a consistent overhead allocation to be applied to the services made available to payphone providers (11 Tr. 23 (Confidential); 12 Tr. 1439);⁶ 5) the fixed overhead allocations for several services offered by Ameritech and GTE exceeded several hundred percent; and 6) for GTE's services, GTE was recovering more overhead expenses from services generally

⁶ As an example, during the hearing, an Ameritech witness was asked "What methodology did you use or assumptions did you use to identify any overhead allocation associated with [Profitmaster] service? His response was: "Again, I didn't use any." The same witness was again asked

:

Q. Was there any calculation done to determine . . . what the appropriate amount of overhead there should be given the cost calculation that you've made?"

A. I made no such calculation.

Q. Do you know if anybody at Ameritech made such a calculation?

A. I don't know.

Q. Would the same be true of the proposed monthly rates for rate zone B and rate zone C in the IPP Coin Line?

A. Yes.

Q. Would the same be true of the proposed monthly rates in rate zone A, rate zone B and rate zone C for the COCOT access line?

A. I simply calculated the cost. Those were the established tariff rates.

subscribed to by independent payphone providers, than for the services purchased by GTE's own payphone division.

19. Witnesses for GTE and Ameritech further testified that when the prices for network services made available to payphone providers were originally established by the MPSC in the 1980's, there was no methodology employed to determine how much overhead costs should be recovered from network services made available to payphone providers, and that there was no attempt at that time to fix the prices based on what would be a reasonable allocation for overhead costs.

20. After hearing the evidence and testimony of the witnesses Administrative Law Judge Nickerson issued a Proposal for Decision ("PFD") to the MPSC. ALJ Nickerson found that the prices proposed by Ameritech and GTE for network services were not cost-based and did not comply with the New Services Test pricing standard mandated by the FCC. More specifically, ALJ Nickerson found that Ameritech and GTE did not use reliable TSLRIC studies to calculate the direct cost of providing the service. In addition, ALJ Nickerson found that there was no methodology used by either LEC to determine what the appropriate overhead costs would be for the services in question. ALJ Nickerson found that the overhead costs for network services to payphone providers from the May 1999 filings ranged from over 100% to well over 600% greater than the direct costs of providing the services. ALJ Nickerson ordered Ameritech and GTE to revise the cost studies for these services to be consistent with the TSLRIC orders in U-11280 and U-11281. ALJ Nickerson further ordered Ameritech and GTE to comply with the cost-based pricing standard adopted by the FCC by using the methodology the

11 Tr. 23-24 (Confidential). Ameritech further acknowledged that the prices it plugged into the May 19, 1997 compliance filing didn't relate at all to the costs.

MPSC adopted in Case Nos. U-11280 and U-11281 to calculate a reasonable overhead amount. *Id.* (A copy of ALJ Nickerson's Proposal for Decision is attached hereto as Exhibit B.)

21. On March 8, 1999, the MPSC issued its Order denying the complaint filed by the MPSC and its members. The Commission's Order finds that the "FCC has not specified any particular methodology for determining costs or reasonable overheads for purposes of compliance with the test." (Order, p. 8.) The MPSC then concludes that it finds no reason to modify the existing rates. Because of this finding, the FCC must provide clearer guidance and direction to the MPSC for the MPSC to evaluate the tariffs filed by Ameritech and GTE.

THE SUBSTANTIVE ERRORS MADE BY THE MPSC.

22. The March 8, 1999 MPSC Order made fundamental and substantive errors in applying the new services test pricing standard to the network services made available by GTE and Ameritech to payphone providers. First, the MPSC held that LECs' satisfy the new services test pricing standard by merely "filing the proper documentation" required by 47 C.F.R. § 61.49. (Order, p. 4.)

A. Ameritech and GTE did not rely upon consistent forward-looking economic costs to identify the direct cost of the services.

23. In fact, the documents filed by Ameritech and GTE had contained incomplete and inconsistent cost studies that the MPSC had previously found to be invalid as overstating costs.

24. Through the Complaint and evidence presented at the hearing, the MPTA and its members argued that the new services test (and Michigan law) required that the

direct costs under the new services test should be calculated through the use of a forward looking economic cost (“FLEC”) methodology, and that the “reasonable overhead” cost also be calculated through the use of a FLEC methodology. Under Michigan law, the total service long run economic cost (“TSLRIC”) is the appropriate standard to determine the cost of a service. M.C.L.A. § 484.2102.

25. In calculating the direct TSLRIC of the service, the MPTA asserted that Ameritech and GTE should use the same cost study methodologies approved by the MPSC in the commission’s cost-of-service proceedings, U-11280 (for Ameritech) and U-11281 (for GTE). In these proceedings, the MPSC approved of the appropriate inputs, assumptions, and calculations used to identify the cost for services and the TELRIC for unbundled network elements provided under 47 U.S.C. §§ 251 and 252. The MPSC also approved of the appropriate methodology to determine the FLEC allocation for the common expenses for UNEs.

26. Ameritech’s cost witness in the MPTA’s complaint proceedings testified that he was responsible for putting together the new services test compliance filing filed with the Commission in May 1997. Mr. Dedominicis acknowledged that the cost studies he used, and the cost studies relied upon by Ameritech to comply with the new services test, had been rejected by the Commission in U-11280. Mr. Dedominicis admitted further that the underlying costs that he used and relied upon to show compliance with the cost-based rate requirements imposed by the FCC were developed at different points in time, and used inputs and methodologies that were rejected by the Commission in the Ameritech TSLRIC Order (U-11280.) Moreover, Ameritech admitted that the prices

charged to IPPs for payphone services included subsidy payments that support other services, and that the amount of support to other services was non-quantifiable.

27. GTE's witnesses also admitted that the TSLRIC studies GTE relied upon for its May 1997 compliance filing had been rejected by the Commission. GTE further admitted that the cost calculation used by GTE for overhead costs had also been rejected by the Commission in MPSC Case No. U-11281. For example, GTE provides two types of access services, COCOT Line (for use with a "smart" payphone) and COPT Coin Line (for use with a "dumb" payphone.) When GTE submitted its May 21, 1997 filing, it developed the price for its Coin Line service (used by GTE's own payphone division) using the cost studies from its UNE arbitration with AT&T under 47 U.S.C. § 251. These cost studies had been rejected by the arbitration panel as relying upon wrongful assumptions that overstated costs. The studies relied upon by GTE also assumed one set of costs for the Drop Facility, Line Termination, Jumper Wire, DTMF, Directory Book, and Usage elements in the Coin Line. GTE then assumed a higher cost for the same elements that comprised the COCOT service (the service used primarily by independent payphone providers.) GTE also identified a cost for "usage" for COCOT service that was over 3.5 times (350%) greater than the cost assumed for usage with GTE's coin line service (used by its own payphones.) Because usage is ubiquitous, it is not credible that there is a 350% cost difference for a "call" made from a COCOT line versus a coin line.

B. Ameritech and GTE did not rely upon a forward-looking economic cost methodology to identify the reasonable overhead costs.

28. In MPSC Case No. U-11281 (GTE's TSLRIC Order), the Commission found that if GTE were to apply a fixed percentage of 17.08% to all of its services, GTE

would recover all of the forward-looking economic common and shared costs of the firm. The MPTA recommended that because the MPSC had already identified a forward-looking economic method of allocating common expenses to a service, that the Commission should use 17.08% as the “reasonable overhead” allocation for payphone services under the new services test. Under the methodology approved by the MPSC in U-11281, if the TSLRIC for a payphone services was \$10.00, the overhead cost allocated to the service would be \$1.71, for a NST price of \$11.71 per month.

29. In MPSC Case No. U-11280 (Ameritech’s TSLRIC Order), the MPSC used a slightly different approach to identify an objective methodology of calculating Ameritech’s shared and common costs. There, the MPSC found that for services provided through Ameritech Information Industry Services (“AIIS”), the division that provides network services to payphone providers, a fixed overhead allocation percentage (which Ameritech claims is proprietary)⁷ was reasonable and sufficient to allow Ameritech to recover the shared and common costs for services provided through AIIS. The MPTA recommended that because the MPSC had already identified a forward-looking economic method of allocating overhead expenses to services provided by AIIS, that the Commission should use the same overhead allocation percentage as the “reasonable overhead” allocation for payphone services under the new services test.

30. The overhead allocation percentages recommended by the MPTA adopting the MPSC’s conclusions from Case Nos. U-11280 and U-11281 were reasonable because at prices using those cost allocations, the prices paid by payphone

⁷ The FCC is able to identify the overhead allocation percentage found by the Commission to be reasonable for services sold by AIIS by referring to the FLEC cost studies and information provided by Ameritech Michigan in the FCC’s Universal Services cost model proceeding.

providers would be cost-based, both in recovering the direct cost of the service, as well as recovering the forward looking economic overhead costs.

C. The prices for Ameritech and GTE's Services are set to subsidize other services.

31. The new services test requires that the revenue derived from the services pay the direct and indirect (commonly referred to as "overhead") costs of providing the services, and not be set at a level that would produce revenue used to subsidize non-payphone provider services. Under the MPTA's approach in applying the new services test, the prices set for payphone services would be set at a level that would fully recover the direct and indirect costs of the payphone services – theoretically no more and no less.

32. In setting the parameters to implement cost-based payphone line rates, the FCC held that prices for network services should not be subsidized with revenue from other services, and should not subsidize other services:

[T]ariffs for payphone services must be filed with the Commission as part of the LEC's access services to ensure that the services are reasonably priced and do not include subsidies.

Payphone Order at ¶ 147 (emphasis added). *See also id.* at ¶ 10; *Payphone*

Reconsideration Order at ¶ 139. This provision requires that the rates for network services made available to IPPs not include subsidy payments to other non-payphone subscribers.

33. Consistent with the historical rationale for the New Services Test, a "reasonable allocation of overhead" would be an allocation of overhead costs that is no greater than necessary to allow recovery of joint and common costs associated with the particular services in question. *See, e.g., Local Exchange Carriers' Rates, Terms, and*

Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order, FCC 97-208, 12 FCC Rcd. 18730, 8 Comm. Reg. (P & F) 524 (1997), at ¶ 312 (“In those orders, we required that, absent justification, overhead loadings assigned to physical collocation service could be no greater than the overhead loadings recovered in rates for comparable services that are regulated under price caps.” (emphasis added.)

33. The FCC clarified its mandate for reasonable overhead allocations when it ordered the prices for network services provided to payphone providers be “cost-based.” The FCC has used these terms in applying Sections 251 and 252 of the Federal Communications Act (47 U.S.C. §§ 251 and 252). Under Section 251 and 252 of the Federal Communications Act, prices for interconnection functions necessary for competing local exchange carriers to are required to be “cost-based”. 47 C. F. R. §51.505(d)(4). The FCC, in its *Local Competition Order*, stated that “cost-based” interconnection rates for services provided between local exchange carriers cannot be set to subsidize other below-cost services. The FCC held:

If a state collects universal service funding in rates for elements and services pursuant to sections 251 and 252, it will be imposing non-cost based charges in those rates. Including non-cost based charges in the rates for interconnection and unbundled elements is inconsistent with our rules implementing section 251 and 252 which require that these rates be cost-based.

See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”), at ¶ 713; *see also* 47 C.F.R. § 51.505. Rates that include subsidies to other services clearly are not “based on cost,” but are based on other public policy reasons.

34. Ameritech acknowledged that its prices for network services were set at levels that subsidize other non-payphone services, and that the subsidies have “not be quantified.” (Exhibit I-19 from MPSC proceeding, attached hereto as Exhibit C.)

35. GTE’ admitted that, although the MPSC held in the GTE TSLRIC order that a 17.08% overhead allocation would recover all of the common and shared expenses with GTE’s services, it’s NST compliance filing was intended to recover a 46% overhead contribution. (12 Tr. 1399-1400.) If GTE recovers 46% overhead from payphone services, the revenue derived from GTE’s payphone services would clearly be set at levels to subsidize the direct costs or overhead costs associated with non-payphone services.

D. EUCL and No-PIC revenue should be included as a revenue source when determining whether Ameritech and GTE rates for services recover their costs.

36. The MPTA also argued that in determining how the LEC should recover its costs for services under the new services test, the MPSC needed to include the End User Common Line charge (“EUCL”) payments made by payphone providers and no-PIC fees charged by LECs to payphone providers. If the analysis ignores the no-PIC and EUCL revenue, Ameritech and GTE would double-recover all or a portion of their loop costs associated with payphone services.

37. The FCC has characterized the purpose of the EUCL as follows:

incumbent LECs assess end users a flat end user common line charge (EUCL), also known as the subscriber line charge (SLC), to recoup part or all of the local loop costs allocated to the interstate jurisdiction.

In the Matter of Access Reform, et al., CC Docket No. 96-262, Notice of Proposed Rulemaking, FCC 96-488 (Released: December 24, 1996), (“*Access Charge Reform NPRM*”) at ¶27. In addition, the FCC has recently confirmed that:

approximately 25 percent of the unseparated cost of incumbent LECs’ subscriber loops (the lines connecting subscribers to local telephone company central offices) is allocated to the interstate jurisdiction. These carriers recover a significant portion of their loop costs allocated to the interstate jurisdiction directly from subscribers through flat monthly subscriber line charges (SLCs)

In the Matter of the Establishment of the Joint Board on Universal Service, CC Docket No. 96-45, Order and Notice of Proposed Rulemaking, FCC 96-93 (Released March 8, 1996), (“*Joint Board Establishment Order*”) at ¶ 112.

38. The No-PIC fees paid by PSPs to Ameritech and GTE also recover non-traffic sensitive costs relating to the loop elements of local exchange service. *Access Reform Order* at ¶38. The FCC held that the purpose of the PICC and SLC are the same:

The PICC is not a universal service mechanism, but rather a flat-rated charge that recovers local loop costs in a cost-causative manner.

Id., at ¶104.

39. The EUCL and No-PIC fees are federally prescribed charges that recover a portion of the LEC’s outside plant and other related expenses associated with the loop facilities. If the TSLRIC of network services already includes the entire cost of the loop facilities (and, by definition it does), then under the new services test, when setting prices it is necessary to attribute the EUCL and No-PIC revenue as an offset of the TSLRIC of the service. If the LEC were to recover the full TSLRIC of the service, plus a reasonable amount for overhead costs, plus the EUCL revenue and No-PIC fees, the LEC would

actually be “double” recovering all or a portion of the loop costs. Failing to account for the EUCL and No-PIC revenue in evaluating the tariffed rate to be charged under the NST would greatly diminish the significance of the new services test.

40. Ameritech and GTE argued that the “FCC requires them to assess the EUCL in addition to the access line charges” and that there is no double recovery of loop costs associated with the payphone access services. (Order, p. 9.)

E. Ameritech and GTE’s rates are not based on cost, but are based on the prices charged for services to business customers.

41. After reviewing the evidence and concluding that “the FCC has not specified any particular methodology for determining costs or reasonable overheads for purposes of compliance with the test” the MPSC denied the Complaint. (Order, p. 8.) In denying the Complaint, the MPSC approved rates that recover overhead costs of over 600%, and approved rates for GTE that recover more overhead costs from the services traditionally purchased by IPPs than those services purchased by GTE’s own payphone division.

42. However, the MPSC’s Order did not even objectively set prices under the new services test. The MPSC’s Order used no FLEC methodology for either the direct costs, or the overhead costs of the services in question. Instead, the MPSC concluded that the rates for services made available to payphone providers should just mirror the rates for services sold to business customers, regardless of the cost-basis for those business services, and regardless of the fact that those prices had been historically set to subsidize other services. (Order, p. 8.) More specifically, the Commission held that it

was not “persuaded that the MPTA’s approach is required by the New Services Test or that its results are preferable to the rates now in place.” *Id.*

REQUEST FOR DECLARATORY RELIEF

43. The MPTA has appealed the decision of the MPSC to the Michigan Court of Appeals and that proceeding is still pending. *Michigan Pay Telephone Association, et al. v. Michigan Public Service Commission, et al.*, Case No. 219950. However, because of the MPSC has misapplied the principals underlying the new services test pricing standard, the FCC needs to clarify for the MPSC certain critical issues for the state commission to apply the test.

44. The MPSC’s Order concludes summarily that the “MPTA has failed to carry its burden to show that Ameritech Michigan and GTE’s payphone services rates are not in compliance with the new services test.” (Order, p. 8.) The Order, however, lacks any application of the facts produced in evidence to the new services test’s legal standards. Therefore, the Complainants request that the Commission review the evidence of record, and apply that evidence to the pricing standards imposed by the FCC.

45. The Michigan Court of Appeals will consider the evidence produced at the hearing before the MPSC, but the FCC needs to give direction to the Court of Appeals that the MPSC’s application of the New Services Test was erroneous. In order for the Court of Appeals to adjudicate the decision of the MPSC, the FCC needs to clarify how state public service commissions should apply the new services test to be consistent with the goals and objective of the Section 276 of the Federal Communications Act, 47 U.S.C. § 276. More specifically, the FCC needs to declare that the MPSC erred in the following

respects when applying the new services test to the network services made available by Ameritech and GTE:

- a. The Commission should declare that the appropriate cost standard to be used in calculating the direct cost of the services in question is a forward looking economic cost methodology that is consistent with state law;
- b. The Commission should declare that the appropriate cost standard to be applied in calculating a "reasonable amount" for overhead is a forward looking economic cost methodology that is consistent with state law;
- c. The Commission should declare that the prices for network services made available to payphone providers be set to not produce revenue that subsidizes either the direct costs or overhead costs associated with non-payphone services;
- d. The Commission should declare that the EUCL and No-PIC revenue must be attributed to offset the costs associated with the access lines, such that the rate, plus the EUCL and No-PIC would recover the economic cost of local exchange service, plus a reasonable overhead costs associated with the service; and,
- e. The Commission should declare that the MPSC not rely upon non-cost-based business service rates when applying the new services test for payphone services.

CONCLUSION

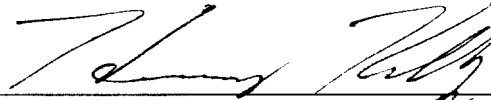
The MPSC erred by denying the complaint filed by the MPTA and its members. However, the denial of the Complaint was caused in part by the failure of the MPSC to fully understand the intent and purpose of the new services test. The FCC needs to declare that the MPSC erred in applying the new services test and clarify the appropriate standards and methodology for state public service commissions to apply the pricing standard. It will serve the public interest for the FCC to clarify its standards in applying the new services test to the rates charged by Ameritech Michigan and GTE.

Wherefore, for each of the foregoing reasons, the Michigan Pay Telephone Association request that the Commission review the decision of the Michigan Public

Service Commission and declare the tariffed rates approved by the March 8, 1999 Order to be inconsistent with the new services test mandated by the 47 C.F.R. § 61.49, the Commission's orders in this proceeding, and 47 U.S.C. § 276.

Respectfully submitted,

MICHIGAN PAY TELEPHONE ASSOCIATION

A handwritten signature in black ink, appearing to read 'Henry T. Kelly', is written over a horizontal line.

By: Henry T. Kelly, one of the attorneys for the
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STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of the)	
MICHIGAN PAY TELEPHONE ASSOCIATION)	
et al. against AMERITECH MICHIGAN and GTE)	Case No. U-11756
NORTH INCORPORATED.)	
_____)	

At the March 8, 1999 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On August 10, 1998, the Michigan Pay Telephone Association (MPTA) filed a complaint regarding the payphone services offered by Ameritech Michigan and GTE North Incorporated (GTE). The MPTA requested that the Commission determine whether Ameritech Michigan and GTE have complied with certain provisions of the Michigan Telecommunications Act (MTA), MCL 484.2201 et seq.; MSA 22.1469(101) et seq., the Communications Act of 1934, as amended by the Telecommunication Act of 1996 (FTA), 47 USC 151 et seq., and orders issued by the Federal Communications Commission (FCC). The complaint involves three major issues:

- (1) Whether the prices for network services are consistent with the new services test adopted by the FCC.

- (2) Whether the payphone operations of Ameritech Michigan and GTE are required to pass an imputation test pursuant to Section 362 of the MTA, MCL 484.2362; MSA 22.1469(362).
- (3) Whether the payphone services provided to independent payphone providers (IPPs) are discriminatory.

On September 1, 1998, a prehearing conference was held before Administrative Law Judge Daniel E. Nickerson, Jr. (ALJ). He granted the petitions for leave to intervene filed by AT&T Communications of Michigan, Inc., (AT&T) and MCI Telecommunications Corporation (MCI). The parties cross-examined the witnesses on November 9, 10, 16, 17, 18, and 19, 1998. The record consists of more than 1,600 pages of transcript and 45 exhibits.

On or before December 9, 1998, the MPTA, Ameritech Michigan, GTE, MCI, and AT&T filed briefs. On December 23, 1998, the MPTA, Ameritech Michigan, GTE, MCI, and AT&T filed reply briefs. On February 16, 1999, the ALJ issued a Proposal for Decision (PFD). On February 23, 1999, the MPTA, Ameritech Michigan, GTE, and MCI filed exceptions. On March 1, 1999, the MPTA, Ameritech Michigan, GTE, MCI, and AT&T filed replies to exceptions.

Background

Since 1985, Ameritech Michigan and GTE have made available network services to the IPPs pursuant to an FCC order while continuing to offer payphone service in competition with the IPPs. The MPTA members, who are IPPs, purchase access and other services from Ameritech Michigan and GTE, usually under the IPP line tariff. The IPPs purchase a pay telephone, typically a unit referred to as a "smart" set, from a vendor to attach to the access line they purchase from Ameritech Michigan or GTE. The smart set is a payphone that functions as a computer with the ability to rate calls and perform answer detection, error messaging, and coin return functions at the phone. The